UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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WATSON, :

Petitioner :

-against- :

GREENE :

Respondent. :

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CV 06-2212

United States Courthouse
Brooklyn, New York

July 16, 2009
12:00 o'clock noon

TRANSCRIPT OF ARGUMENT
BEFORE THE HONORABLE CAROL BAGLEY AMON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner: WILLIAM CARNEY, ESQ.

For the Respondent: ANNE FEIGUS, ESQ.

Court Reporter: Gene Rudolph
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE CLERK: Watson versus Greene, 06 CV 2212.

THE COURT: Good afternoon.

MR. CARNEY: Good afternoon.

MS. FEIGUS: Good afternoon, Your Honor.

THE COURT: We have Ms. Feigus and Mr. Carney.

Mr. Carney, why don't I hear from you first.

I have a couple of questions. Let me just ask this as an initial matter. Is the real claim here that the confrontation right was violated, or is it more in the nature of precluding a defense?

MR. CARNEY: Well, I think they are interrelated, Your Honor, by the fact that we couldn't cross-examine the detectives about their failure to pursue this lead and do a thorough investigation in the case. We couldn't present our defense raising a reasonable doubt in the minds of the jurors, that the police had had a kind of tunnel vision on the petitioner and not fully followed every lead pointing to other suspects.

In this case, the one other suspect, Keemie Harvey, when they had this document, this memo, provided by a police officer in the detective's file, indicating that Harvey had been the shooter and that the gun had gone off accidentally. This information it turns out, according to the prosecutor, came from Harvey's mother. And if you look at the statement itself, I think that the defense could have made great impact

with the jury with the idea that this statement had the classic marks of reliability and a statement against penal interest in the sense that --

THE COURT: No. You are not arguing that the statement itself would have come in -- you've never argued that it would come in as affirmative evidence that Harvey had the gun.

MR. CARNEY: Well, I think that to the extent that -- that the statement -- had we been able to establish, as came out not in front of the jury but in discussions with the prosecutor, that this statement was provided by Harvey's mother and that the statement itself, even if not offered for the truth, it does have somebody saying, I did it but it went off accidentally, in offering some sort of mitigating circumstance.

The fact that we weren't given the statement in time to do our own independent investigation and contact Officer Pierce or Rakeem Harvey --

THE COURT: You had all of that information prior to the end of trial. In other words, you had the ability to call the Pierces, if you wanted. They had talked to people. What their information was was out there. But that goes more to your Brady issue.

MR. CARNEY: That does go more to the Brady issue. I feel that the three -- there are three aspects of prejudice

here. That's the Brady issue, whether we were materially prejudiced by what we feel is an untimely and incomplete disclosure of this memo. One is that we are not given the opportunity to fully investigate this information prior to a time when it has become clear to the Harvey family that he is no longer the primary suspect.

Initially, it appears --

THE COURT: Why are you entitled to that kind of timing? You'd be entitled -- you could argue that you should be entitled to have it prior to trial so you can investigate everyone. What would give you the right to have it before Harvey understood or his parents understood that he was a suspect? I don't see that kind of --

MR. CARNEY: The case law says that the prosecution is obligated to turn over material, exculpatory documents, at the earliest possible opportunity and at a time when these documents can be used by the defense. That's also the rule of --

THE COURT: I understand that.

It depends on what you mean by "used by the defense." I don't think -- assuming they gave it to you a year before but Harvey had already been identified and his family was concerned about it, and if they had have given it to you a year before and one month right in that interim before they knew about Harvey's involvement, are you

contending that it wouldn't have been given to you in enough time? I don't think that timing -- the kind of thing that you are talking about, that somehow maybe if you had gotten it earlier Harvey's parents wouldn't have known. I don't find that persuasive.

Let me ask you another question. Harmless error can apply. Do you agree with that? These are not structural errors.

MR. CARNEY: It doesn't -- well, under Brady there is no such thing as harmless error -- as harmless error. But the harmless error is kind of incorporated in the first instance because you have to establish that it's material and prejudicial in the first instance. So -- in doing that, courts look to the same standard. I know this is one of your questions as well. That goes to our denial of the right to present a defense in confrontation, which is now clear. The Supreme Court has issued a relatively recent decision on this, that it's the Brecht v. Abramson standard.

THE COURT: You agree, that whether we call it confrontation, failure to present a defense, Brady, however you want to characterize the violation, the same Brecht harmless error standard applies; is that correct?

MR. CARNEY: That is correct.

So whether or not the -- had the evidence been disclosed it would have cast the case in a different light and

had a reasonable probability of creating a different verdict, the one thing that is special to the denial of our right to confrontation, which goes to the prejudice component, before you reach harmless error is under Delaware v. VanArsdall, in assessing the prejudice of the Court's denial of our right to present a defense or to confront the detectives about their failure to pursue this information, the Court is supposed to assume that the damaging potential of cross-examination would have been fully realized.

It's interesting in this case that we did have Detective Bond, the lead detective, appear outside of the jury's presence and when asked, did you ever confront Rakeem Harvey with this information in a memo or why didn't you talk to his family, he said oh, I knew that he had the gun. I had that information.

Now, that is kind of a curious bit of testimony, since the defendant was then the one facing first degree murder charges and Harvey was testifying under a very advantageous cooperation agreement.

If the detective was just being facetious or flippant in his response, that would have been something that the defense would have been very interested in presenting to the jury as well, because that would have supported their contention that they didn't seriously follow this lead.

THE COURT: Another question that I asked was this.

A habeas is equitable relief. This piece of evidence that you wish to get in that you were not able to get in and what I think you could have gotten in was the cross-examination of the police officer. I don't know that the note would have come in, but the cross-examination of the police officer, that he had this information and that he didn't do anything about it, seems like to me, you should have been able to put that information in under Kyles and the cases such as that.

This testimony, I take it, went to the issue of the first degree murder, who had the gun?

MR. CARNEY: Correct.

THE COURT: Because, as I understand it, you did not contest that Mr. Watson was there or that he was part of a robbery.

MR. CARNEY: Correct.

THE COURT: Assuming you prevail on this, why isn't your remedy a remand for resentencing on second degree murder?

MR. CARNEY: Because a related defense, there was also a charge -- lesser charge of second degree murder under the theory that petitioner was present but he wasn't the shooter, and that he wasn't aware, the affirmative defense to second degree felony murder under New York law, that he wasn't aware that Harvey had a gun and the jury would never have gotten to that issue if they accepted that petitioner had been the shooter in the first instance.

Had we been able to raise a reasonable doubt on that issue the jury would still have -- had to deliberate on this second issue, which is the second degree murder charge under the affirmative defense.

THE COURT: That wasn't affirmative evidence, that -- the note itself wasn't affirmative evidence that Harvey in fact had the gun.

MR. CARNEY: It could have raised a reasonable doubt to the issue that he had the gun, which is something that the jury had to find as a necessary prerequisite to then reaching the second degree murder. So it did -- it did have a strong impact on our defense to that issue as well.

THE COURT: Assuming the jury would have concluded that -- the best the jury could have concluded, I guess, from the admission of the evidence was that there was reasonable doubt that Watson had the gun. Because it wasn't -- super technical, I guess -- but it did not constitute affirmative evidence, that Harvey had the gun.

Had Harvey been on trial, that evidence could not have been used to establish --

MR. CARNEY: I don't think the jury would have been unreasonable -- of course, you never know what facts the jury is reaching in acquitting somebody of the top charge in this case, that petitioner was the shooter. But the jury wouldn't -- first of all, that wasn't a necessary prerequisite

for them to reach the second degree charge. And since the statement itself, and the police officer's failure to pursue that could raise reasonable doubt, that meant that they could reach that second issue but they never got a chance to really deliberate on it as the case was presented to the jury in this instance and so it can't just be remanded for a sentencing on that because it was an issue that the jury never reached in this case.

THE COURT: What about the armed robbery? He admitted in his --

MR. CARNEY: He admitted the armed robbery but the jury -- part of the armed robbery is that the defendant doesn't have the gun. So that -- that petitioner doesn't have the gun. So if --

THE COURT: He admitted he was guilty of armed robbery.

MR. CARNEY: He admitted he was guilty of armed robbery. We have the affirmative defense which the jury would never be deliberating on if --

THE COURT: That's not an affirmative defense. If he is part of a robbery where the other person has the gun -- he admitted to the jury that he was guilty of armed robbery.

MR. CARNEY: That his statement, the defendant's -- petitioner's statement is that Harvey had the

gun and he pulled it off -- he pulled it out and shot Morris and that the defendant -- petitioner was not aware of that.

Under New York law, that's -- that's the affirmative defense to felony murder. If you are participating in a robbery but you are unaware the other person has a gun --

THE COURT: Is it an affirmative defense to participating in an armed robbery as well, that you knew you were participating --

MR. CARNEY: For the second degree murder charge.

THE COURT: No. I am talking about just the armed robbery. He was charged with armed robbery as well, right?

MR. CARNEY: Okay. So, yes, he -- they would -- he would be guilty of armed robbery under this. But not second degree murder.

THE COURT: Okay. What is the sentence for armed robbery?

MR. CARNEY: Offhand, I -- eight -- I am not sure.

THE COURT: I know the state wouldn't agree. I presume the state wouldn't agree to this. But if habeas was granted, could it be remanded for a sentencing on armed robbery based on his admissions?

MR. CARNEY: I think so, yes.

Just one other thing. A related part of our prejudice analysis is that then because this information and the police failure to follow this lead was never presented to

the jury in any way, the prosecutor was really able to exploit that in their summation in making arguments for petitioner's guilt saying, did the police not fully follow every lead, did not every lead point to petitioner, didn't they do an excellent and thorough investigation in this case?

The very thing that we wanted to undermine them on, they were able to talk to the --

THE COURT: Where does that fit in? You don't have a summation claim here. That fits in on the harmless error theory?

MR. CARNEY: It goes to the prejudice and harmless error. It's the United States v Gil case, the Second Circuit case that we cite in our brief. They -- the Court there states explicitly that in instances like this, where the Brady material, that you are not allowed to refer to that, if that's then touted in the summation, that exacerbates the prejudice or the flip side of it, the harmless error analysis.

THE COURT: Assuming this was error -- another thing to look to is the strength of the evidence. Correct?

MR. CARNEY: Correct.

THE COURT: So you have an eye -- we have someone who indicates that they saw Watson with the gun at the scene. Then, of course, you have Harvey's testimony. So you have an accomplice and then you have that accomplice corroborated by, I believe -- corroborated as to the fact that he was the one

that was with the gun by the witness Jean-Louis. Why isn't that very strong evidence?

MR. CARNEY: Harvey obviously is a witness with very strong interest in the case, testifying under a cooperation agreement. He's actually the only person who says that petitioner is the shooter.

Even the one eyewitness who claims that petitioner has a gun is not saying he's the shooter. He sees the gun in his hand. It's circumstantial but he's the one witness. He's also the witness who is unable to identify petitioner at the lineup and then he says --

THE COURT: What he says about the petitioner is consistent in terms of his description of him with other witnesses who did pick him out of the lineup.

MR. CARNEY: There were some conflicts between the witnesses. Harvey in his -- in his account of the incident never admits that he's the guy who says give it up, give it up, and the more you resist, the worse it will be.

Although that's what Ramcess Jean-Louis said. That was his role in the statement. With Jean-Louis, his testimony tended over the course of time to -- to evolve into something that more and more fit into the pattern of the prosecution case.

As the Supreme Court has said in identification cases, like Manson v Brathwaite or Kyles v Whitley, that part

of the cornerstones of identification is reliability and always having the same statement.

He denied that he said I failed my friend after he failed to pick out petitioner at the lineup.

He denied that in several of his earlier statements he was -- that he didn't have petitioner wearing the gray sweat suit, which was an important part of the identification of the man having the gun at the trial.

He also claimed that he had also described petitioner as having a long droopy face, but that wasn't in any of his prior statements and with -- when confronted with those, he seemed to be very much following a script in making these assertions. But there were prior inconsistencies in his statement.

THE COURT: How about between Jean-Louis and the testimony of other witnesses?

MR. CARNEY: Well, other witnesses --

THE COURT: Curt Phillips and Stephens-Prince, for instance?

MR. CARNEY: Stephens-Prince said the man towards the rear of the car, which is where Rakeem Harvey said he was standing, was leaning in and saying give it up, give it up. But his trial testimony was also saying that the one leaning in was wearing the gray sweatshirt and was light skinned and that was petitioner.

Loren Hillery -- Loren Hillery couldn't tell who was wearing what, who was the one in the gray sweatshirt, who was the light skinned one, who was the dark skinned one.

In the case of all these witnesses, there seemed to be evolution in their ability to identify, where suddenly at trial they were providing much greater details and more consistent details than they had given in their initial statements to the police.

THE COURT: Let me ask you a question, something that I don't know about state law.

He was charged with all these different offenses. But the Court told them to return a verdict on the first offense first and the jury never reached a verdict as to the others? Is that standard practice?

MR. CARNEY: Yes, yes. They -- the Court will instruct them to consider the first degree murder charge and only go on, in this case, to second degree if they acquit him of the first degree.

THE COURT: What about the armed robbery and all that? Why don't they deliberate on those charges? Are they all lesser included?

MR. CARNEY: They are lessers in this instance.

THE COURT: They are all lesser included of the first degree murder?

MR. CARNEY: First degree murder, felony murder

charge in this case.

THE COURT: That's why, for instance, you believe it would be appropriate, assuming the state agreed, which I doubt that they will, but to, as an equitable matter, instead of granting a new trial per se, to just direct that he be resentenced on the armed robbery?

MR. CARNEY: That's correct, Your Honor.

Everybody -- I mean, both Harvey and petitioner admitted ultimately that they were involved in an armed robbery, although part of our contention is that Harvey kind of minimalized his participation.

THE COURT: It wasn't agreed he participated in an armed robbery. Why does he plead guilty to second degree murder under that theory?

MR. CARNEY: Harvey?

THE COURT: No. You were saying everybody agreed that they were in an armed robbery. But if that's the case --

MR. CARNEY: Because he has to know that the other person has a gun.

THE COURT: If he admits he's involved in armed robbery, he's admitting that the other person had a gun.

MR. CARNEY: Well, then maybe in a robbery where there are two people involved, but he is not admitting it's an armed robbery.

THE COURT: Then it couldn't be remanded for armed

robbery? Even though he told the jury that hey, I am guilty of armed robbery?

MR. CARNEY: His statement was that he didn't know that -- that Harvey had a gun. So I guess he didn't admit -- he admitted he was involved in a robbery but not in armed robbery.

THE COURT: What was he charged with?

MR. CARNEY: He was charged with felony murder. The idea that he was in a robbery and in this --

THE COURT: That was the second degree murder charge?

MR. CARNEY: Second -- second degree murder, yes.

THE COURT: That wouldn't have necessarily been based on a felony murder theory.

MR. CARNEY: I believe it was. I don't have the indictment.

THE COURT: In other words, he was -- as the shooter he was guilty of first degree?

MR. CARNEY: Right.

THE COURT: Second degree would have been the felony murder theory?

MR. CARNEY: Felony murder, and if he was not aware that the other person had a gun.

THE COURT: Then what is he guilty of?

MR. CARNEY: He was not guilty of felony murder.

THE COURT: What about armed robbery?

MR. CARNEY: I am not sure that he -- I am not sure about that.

THE COURT: Then you are --

MR. CARNEY: It could be a robbery. There is a robbery where there are two or more people involved in a robbery. That could be the basis of the robbery.

THE COURT: Do you remember what the specific robbery charge was?

MR. CARNEY: I don't. I don't have the indictment with me.

THE COURT: All right. Ms. Feigus, I will hear from you.

Ms. Feigus, assuming that I concluded that this was a problem, that the note should -- there should have been permitted to be testimony about the note and it wasn't harmless error, what's the relief?

MS. FEIGUS: Your Honor, we have researched this in the Appeals Bureau. I am sorry, I don't have my penal law.

The defendant was charged with two counts of first degree robbery. The remanding it for resentencing on the second degree murder I believe is problematic because the defendant requested the affirmative defense. His claim was that he did not know that Rakeem Harvey had a gun. He denied he was the shooter and he said -- he claimed did he not

know -- in his last statement, that he didn't know Rakeem Harvey had the gun. So the jury did not have an opportunity to deliberate on that charge.

THE COURT: Okay. What about the robbery?

MS. FEIGUS: The robbery, I -- I do have the -- I do have the Court's charge here. The Court did charge -- of course, they didn't deliberate on the first -- on the first degree robbery either. It's the charge that the -- the Court's charge basically said the People had to prove these two elements, that he forcibly stole property from Patrick Morris on July 12, 1998, and that in the course of the commission of the crime the defendant or another participant caused serious physical injury to Patrick Morris.

THE COURT: He admitted all of that.

MS. FEIGUS: Yes. But that --

THE COURT: But he couldn't be -- he couldn't be remanded -- couldn't be -- his first degree and second degree --

MS. FEIGUS: If they were found -- if the theory is acting in concert, they wouldn't necessarily have --

THE COURT: Doesn't say --

MS. FEIGUS: It just seems -- if the jury -- the jury did find, here the jury -- it is clear, the jury did find that the defendant was armed and that the defendant was the shooter.

THE COURT: Right.

MS. FEIGUS: The --

THE COURT: Assuming that they didn't have the piece of information that they had --

MS. FEIGUS: That they didn't?

THE COURT: Didn't have, they could have well had a reasonable doubt, let's say, that he was the shooter. That's what the information -- it wouldn't have established affirmatively that Harvey had the gun.

MS. FEIGUS: Your Honor, may I?

THE COURT: Yes.

MS. FEIGUS: The evidence in this case overwhelmingly established that Darrell Watson was the shooter. May I address that?

You asked Mr. Carney about the testimony of Ramcess Jean-Louis who put the gun in the defendant's hand. I would just like to go through the quantum of evidence in this case that proved that he was in fact the shooter here.

First, the People presented a witness. Rakeem Harvey testified that he and the defendant were on their way to a party.

THE COURT: Okay. He basically testified that it was Watson who had the gun.

MS. FEIGUS: Right.

But we have a -- we had a witness, Freddy Burns --

THE COURT: Who saw him at a party.

MS. FEIGUS: Shortly before the crime lifting up his waistband and flaunting a gun.

When the defense -- after they cross-examined Ramcess Jean-Louis, the defense put in three documents -- three pieces of evidence that they argued impeached his identification -- Mr. Jean-Louis's identification of defendant as the person who was holding a silver revolver in his right hand.

I looked through our file, which is voluminous, and I had actually called Mr. Carney about this. I thought it might elucidate something. And I have a copy of these documents for Your Honor, if I may.

THE COURT: Is it something in the court record?

MR. CARNEY: Yes.

MS. FEIGUS: Yes.

THE COURT: Okay.

MS. FEIGUS: Your Honor, they sought to impeach Mr. Jean-Louis on the basis of a DD-5 that a -- statements that he made to a police detective on the precise day that the crime was committed. Their claim is -- their argument is that because Mr. Jean-Louis was confused about which of the two perpetrators was wearing the gray sweatshirt, his -- his identification lacks reliability.

But there are certain facts in this case that are

undisputed by defendant's very admissions. There were only two perpetrators here. They had very distinctive physical appearances. One was substantially -- they were both African-American males. One was substantially darker skinned than the other.

THE COURT: I understand that the light skinned guy was the one that Mr. Jean-Louis said had the gun. Even though Jean-Louis didn't put the sweatshirt on him at one time, all the other witnesses put the sweatshirt on the light skinned guy and the sweatshirt was found in his place.

MS. FEIGUS: But, Your Honor, there is another aspect of the evidence in this case, which comes from the defendant's very own mouth, that is damning evidence of his consciousness of guilt.

First, after he was -- he dropped his -- as you know, he dropped his wallet at the scene, took the victim's cellphone and was making calls to the cell -- to friends, numbers in his wallet, on the victim's cellphone.

THE COURT: That means he is there. I am talking about overwhelming evidence of the guilt that he shot him.

MS. FEIGUS: Yes, Your Honor.

THE COURT: Nobody is disputing he was there.

MS. FEIGUS: Right.

The first -- the first thing he told the police, he -- if -- if Darrell Watson had said from the get-go in this

case, Keemie Harvey had the gun, it would be a very different case. But that is not what happened here.

First he said he bought the phone from a person. Went to a playground with the police. They arrested that person. Jason --

THE COURT: I know. He goes through a series. Only when he gets to the third time does he put the gun in --

MS. FEIGUS: Yes, Your Honor. But more than that, Your Honor.

In the second statement he accuses a completely innocent person of being the shooter, a man named Jahad Grant. Not only does he say Jahad Grant was the shooter and pulls the gun out of a paper bag, he dresses him in precisely the same clothes that he was wearing.

He knew that three people or four people rushed outside after this single shot was fired. He knew that they had seen him and Rakeem Harvey. There is no -- no dispute that he was wearing glasses, that he was light skinned and that he was wearing this gray sweat suit with a Tommy Hilfiger logo.

If Darrel Watson made Jahad Grant the shooter and dressed him exactly as he had been dressed, he didn't make Keemie Harvey the shooter.

And he also in that statement lied about -- he said he was wearing a T-shirt and beige pants. He took a

completely innocent person and made that person the shooter, dressed him in his clothes, and attributed the clothing and the role in the crime to Rakeem Harvey that Rakeem Harvey consistently said that he played.

Only after Jahad Grant was not identified by three of the -- I won't call them eyewitnesses because they didn't actually -- they were there within seconds after hearing the shot. Only then did he put the gun in Keemie Harvey's hands.

That statement -- it's not just the statement, that Jahad Grant was the shooter. Defendant portrayed himself as the lookout. That is damning evidence of consciousness of guilt. He dressed him exactly as he had been dressed.

From the get-go, Ramcess Jean-Louis said the man, as you will see in the DD-5 that I handed up to the Court, that the man with the glasses, the light skinned man with the glasses, was holding the silver revolver.

So you -- it's an odd circumstance. You don't just have the testimony that the defendant had the gun shortly before the crime, a very distinctive looking gun. You have the testimony that Ramcess Jean-Louis sees the silver revolver in his right hand, that he was the one who engaged in conversation with Mr. Jean-Louis. That was corroborated by Mr. Hillery and Mr. Phillips. But you have the defendant concocting a scenario where he takes a person who is completely innocent of this crime and makes that man, that

innocent man, the shooter.

THE COURT: All right. Let me ask you about another question.

Do you agree at this point in the proceeding that it was error to exclude cross-examination of the officer about this note, considering the cases that talk about a relevant line of inquiry being the investigation that was conducted?

MS. FEIGUS: I think, Your Honor, that this was problematic given the document itself. The document was simply a notation or a memorialization. It does not indicate that anybody, let alone Rakeem Harvey, made an admission that he was the shooter. And when the -- when the Court, rightly so, pressed the prosecutor to look into it, it turned out that the most that could be said was that Keemie Harvey's mother had said that somebody else had said that Keemie had the gun.

The cross-examination --

THE COURT: I don't know that it was the mother who said that somebody else said.

MS. FEIGUS: Yes, Your Honor, I believe so.

THE COURT: I thought it was that --

MS. FEIGUS: No.

THE COURT: -- that Keemie said he had the gun.

MS. FEIGUS: No, Your Honor. I actually -- I can point Your Honor to the -- I did a little -- it was that Keemie -- that his mother heard that he had said. So it was

yet another layer of hearsay. That is -- and that was what was troubling Judge Tomei, that it was layer upon layer.

THE COURT: That's why it doesn't come into evidence. But how do you have a situation where there is a note in the file which suggests that Keemie said to somebody that he had the gun and it went off accidentally? How do they not pursue that?

Once it all came to light, they were able to pursue it back to the mother, at least. Why isn't it an appropriate error -- area of cross-examination that you had this note and you didn't look into it? You just let the note sit there.

Ultimately, when they did look into it, they did find -- they went back to the police officer. The police officers, relative to the mother, they got back that far in it, and what troubles me about it is that -- it would be one thing if it was just, that's where it ended. But the prosecutor's summation just goes on and on about the great police work that was done here, which, you know, is, at the very least, a little disingenuous when they have been told that -- not allowed to cross-examine about it.

Are you still maintaining the position that it wasn't error to exclude the note? I mean, to exclude -- not the note itself. To exclude cross-examination about the note?

MS. FEIGUS: Your Honor, I believe -- I believe it's a close question, but it was a matter of discretion.

The Court -- the Court was of the view that by cross-examining the police, the defense was sort of trying to get in through the back door what they had been precluded from doing in terms of -- they wanted a stipulation about that document and the Court said, rightly, this is inadmissible hearsay.

And the defendant's analogizing this --

THE COURT: It was inadmissible hearsay for the purpose that Harvey had the gun. But they articulated that they had another purpose, which was to show that the police never investigated, that they assumed from day one that Watson had the gun. They never even confronted Harvey with the fact hey, did you have the gun. They never asked him that question. That they had this one dimensional view of the case and they never went past that. That's at least argument that they can -- that a defendant can make to the jury.

But it is particularly exacerbated here when you have the prosecutor saying, is there any evidence of any lead they didn't follow.

MS. FEIGUS: Your Honor, that was clearly -- should have been left unsaid, clearly.

THE COURT: It wasn't just that. It was a couple of other statements as well, which is troubling.

MS. FEIGUS: But, Your Honor, the -- the defense was able to mount the defense that it was -- that Keemie Harvey

was lying and that Keemie was the shooter. They were able to present their defense here. Given this -- if you only had --

THE COURT: They were able to mount that defense in part because, I take it, that the State put in Watson's statements. Correct? As evidence?

MS. FEIGUS: Yes.

THE COURT: In which he said Keemie had the gun.

MS. FEIGUS: In which he ultimately said Keemie had the gun.

THE COURT: The jury was aware of the defendant's position, Watson's position, that he claimed that Keemie had the gun?

MS. FEIGUS: Absolutely.

They cross-examined him in detail about his very beneficial cooperation deal, et cetera.

But if -- if you just had the testimony of Freddy Burns and the identification of Ramcess Jean-Louis, the -- the evidence in this case would be weighty. But given that -- given the lie, given the false statement that the defendant himself gave here, this is -- should be subject to -- is subject to harmless error analysis, and assuming that the decision to forbid the defense to cross-examine Detective Bond and Officer Pierce about the failure to investigate whether Keemie Harvey was the shooter, and the prosecutor's statements in summation, any error was harmless.

THE COURT: Okay. Thank you. Thank you very much for coming in. I appreciate it.

MS. FEIGUS: Your Honor, would you like papers? Is there anything that you would like to --

THE COURT: I don't think that I need any further -- I think we have addressed the issues.

Both parties are essentially of the view that even though it's equitable relief, it couldn't be remanded for resentencing on a lesser offense. Both parties agree to that.

MR. CARNEY: I think that actually having heard that -- the way that it was charged to the jury, it doesn't -- it was first degree robbery. But there was no mention of a gun. So I believe that it could be remanded. There was no admission that there was a gun involved. It is just a forcible robbery and serious injury and two people involved.

THE COURT: Do you agree with that then?

MS. FEIGUS: Your Honor, I would like to look into it, if I may.

THE COURT: All right. Maybe you want to put in, a week from today, just put in your view of that issue?

I take it, if the Court -- one issue would be whether this -- the State would agree to that. In other words, you would have the right -- if I vacated this conviction over the error, you would have the right to retry

him on first degree murder. It might be relief that you would -- that the State would object to.

MS. FEIGUS: Right.

But, Your Honor, would it be possible for me to have a little more time to look into this?

THE COURT: Yes.

Two weeks?

MS. FEIGUS: I have a vacation, a family vacation. Is it possible to just do it in August?

THE COURT: Yes. The end of the first week in August then?

MS. FEIGUS: I am away then. I just -- this may be something that needs to be discussed with -- this isn't going to be something that I can determine on my own.

THE COURT: The end of the second week in August then?

MS. FEIGUS: I am away.

THE COURT: You are away all of August?

MS. FEIGUS: No. I will be back at the beginning of the third week.

THE COURT: Do you have any objection to this?

MR. CARNEY: No, no objection.

THE COURT: Okay. Tell me when you can do it, Miss Feigus.

MS. FEIGUS: The --

THE COURT: Instead of letting me play Let's Make a Deal here.

MS. FEIGUS: Thank you, Your Honor.

THE COURT: The 21st?

MS. FEIGUS: What day is that?

THE COURT: That's Friday.

MS. FEIGUS: Yes, Your Honor. That's fine.

THE COURT: Okay. If you wanted to respond to it, maybe the 28th. You can be looking into the issue at the same time.

MR. CARNEY: August 28th?

THE COURT: Yes.

MS. FEIGUS: It's whether Your Honor remands it?

THE COURT: Yes. And what the State's position is. You could say that I could do it or I couldn't do it. But if you could do it, it's -- we would --

MS. FEIGUS: Object?

THE COURT: -- insist on our right to retry for first degree murder or second degree murder.

MS. FEIGUS: Okay.

THE COURT: If you are capable of indicating what your position would be in that context.

Okay?

MS. FEIGUS: Thank you, Your Honor.

THE COURT: Thank you. (Matter concludes.)